

U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601



BRB No. 16-0055 BLA

OMA H. HATTON)	
(Widow of CLYDE HATTON))	
)	
Claimant-Respondent)	
)	
v.)	
)	
WESTMORELAND COAL COMPANY)	DATE ISSUED: 12/21/2016
)	
Employer-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits on Remand of Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

Wes Addington (Appalachian Citizens Law Center, Inc.), Whitesburg, Kentucky, for claimant.

Paul E. Frampton and Michael J. Schessler (Bowles Rice LLP), Charleston, West Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, BUZZARD and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits on Remand (2011-BLA-05437) of Administrative Law Judge Lystra A. Harris, rendered on a survivor's claim¹ filed on March 8, 2010, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case is before the Board for the second time.² In *Hatton v. Westmoreland Coal Co.*, BRB No. 13-0219 BLA (Feb. 20, 2014) (unpub.), the Board held that employer's new evidence concerning the revocation of Dr. Dennis's license, if admitted, could affect the administrative law judge's weighing of the autopsy evidence pursuant to 20 C.F.R. §718.304. Therefore, the Board vacated the administrative law judge's award of benefits and remanded the case to the administrative law judge to consider whether this evidence should be admitted into the record and, if admitted, whether it impacted the credibility of Dr. Dennis's opinion. Further, the Board instructed the administrative law judge to explain her basis for finding that Dr. Dennis's status as the autopsy prosector conferred an advantage to him over Dr. Caffrey, a reviewing pathologist, in determining whether complicated pneumoconiosis was present. The Board also instructed the administrative law judge to reconsider and explain her determination of which circuit court's case law applies, based on where the miner performed his last coal mine employment. Finally, the Board instructed the administrative law judge that, if claimant did not establish that the miner had complicated pneumoconiosis, she must determine whether claimant is entitled to invocation of the rebuttable presumption of death due to pneumoconiosis set forth in Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012), or whether she established entitlement pursuant to 20 C.F.R. Part 718 without the benefit of the presumption.

On remand, the administrative law judge initially determined that the evidence regarding the surrender of Dr. Dennis's medical license would not be made part of the

¹ Claimant is the widow of the miner, Clyde Hatton, who died on September 27, 2009. Director's Exhibit 9. The miner filed three claims for federal black lung benefits during his lifetime, all of which were finally denied by the district director. LM-1 Closed Claim; LM-2 Closed Claim; LM-3 Closed Claim (unstamped exhibits).

² In her initial decision, the administrative law judge applied the law of the United States Court of Appeals for the Sixth Circuit and found that claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304, based on Dr. Dennis's autopsy report. The administrative law judge further found that the miner's complicated pneumoconiosis arose out of coal mine employment, pursuant to 20 C.F.R. §718.203(b), and awarded benefits. The administrative law judge denied employer's motion for reconsideration, rejecting employer's request to reopen the record for admission of documents pertaining to the suspension of Dr. Dennis's medical license. Employer subsequently appealed the administrative law judge's award of benefits and denial of reconsideration to the Board.

record because employer did not submit a brief or a motion on remand requesting that the record be reopened for consideration of this evidence. In the alternative, the administrative law judge concluded that Dr. Dennis's misconduct did not affect the probative value of his diagnosis of complicated pneumoconiosis. Considering the merits of the claim, the administrative law judge again credited Dr. Dennis's diagnosis of complicated pneumoconiosis over Dr. Caffrey's contrary opinion, finding the evidence sufficient to invoke the irrebuttable presumption of death due to pneumoconiosis pursuant to 20 C.F.R. §718.304. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in her consideration of Dr. Dennis's opinion. Claimant responds, urging the Board to reject employer's contentions regarding the effect of the revocation of Dr. Dennis's medical license on his credibility, and to affirm the award of benefits. The Director, Office of Workers' Compensation Programs, declined to file a substantive response brief in this appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.³ 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Initially, we reject employer's contention that the administrative law judge erred in determining that Dr. Dennis's misconduct, and the subsequent revocation of his medical license, did not detract from the credibility of his autopsy report.⁴ Decision and Order on

³ On remand, the administrative law judge, consistent with the Board's instructions, and solely for the purpose of determining the location of the miner's last coal mine employment, admitted into evidence the employment records from claims the miner filed in 1973, 1997 and 2002, and labeled LM-1, LM-2 and LM-3, respectively. Decision and Order on Remand at 3. Based on these documents, she correctly found that the miner's last coal mine employment was in Virginia. *Id.* Accordingly, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

⁴ The administrative law judge also observed on remand that employer did not request that the record be reopened for admission of the new evidence it presented to the Board, concerning the revocation of Dr. Dennis's medical license. Decision and Order on Remand at 4. Consequently, the administrative law judge determined that "no new

Remand at 4-5. An administrative law judge has broad discretion in resolving procedural matters and determining the credibility of the evidence. *See Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-67 (2004) (en banc); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989) (en banc). In this case, the administrative law judge acted within her discretion in finding that Dr. Dennis's misconduct did not detract from the credibility of his autopsy report because: it occurred more than two years after he performed the miner's autopsy; it did not "bear upon his knowledge, skill, experience, training, or education in pathology;" and it had "no relation to fraud or dishonesty involving the Black Lung program." Decision and Order on Remand at 4-5. We hold that the administrative law judge permissibly exercised her discretion in finding that the allegations against Dr. Dennis and the suspension of his medical license, for reasons unrelated to this case or his expertise in pathology, did not affect the credibility of his autopsy report in this case. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-235 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997).

Further, employer sets forth several allegations of error concerning the administrative law judge's weighing of the autopsy findings of Drs. Dennis and Caffrey at 20 C.F.R. §718.304. Dr. Dennis performed an autopsy on September 28, 2009, at the Everidge Funeral Home. Director's Exhibit 10. On gross examination of the miner's right lung, Dr. Dennis observed "a black irregular splotchy pleural surface with macular development palpable 1 [centimeter] to 1.5 [centimeters] scattered throughout" the lung. *Id.* Additionally, he noted the appearance of pigment clusters throughout the entire surface of the lung, emphysematous changes with some collapse of the alveolar spaces, and that "black pigment deposition demarcates the luminal of these alveolar spaces." *Id.* With regard to the gross description of the left lung, Dr. Dennis observed a "similar composition of the pleural surface," with "splotchy black pigment," "wrinkled areas of emphysematous change," macule formation, with macules measuring 1.5 centimeters, and emphysema in the surrounding pulmonary tissue. *Id.* Dr. Dennis also observed a white irregular infiltrative malignant process in the posterior lobe. *Id.*

Dr. Dennis's microscopic description noted moderate to severe abscess formation with emphysematous changes, pulmonary congestion, embolus and edema, simple coal workers' pneumoconiosis, focal areas of fibrosis, black pigment deposition, scattered macular development ranging from 0.3 to 1.5 centimeters, and "severe bronchopneumonia with obscuration of other disease processes inclusive of progressive

evidence regarding Dr. Dennis's medical license can be considered or admitted into the record." *Id.* Employer does not dispute the administrative law judge's finding on appeal.

massive fibrosis.” Director’s Exhibit 10. Dr. Dennis’s final diagnoses included: pulmonary congestion and edema, moderate to severe emphysema, progressive massive fibrosis with moderate to severe emphysematous change, black pigment deposition, “macular development greater than 1.5 [centimeters] with two distinct foci of adjacent emphysema moderate to severe with macular development,” bronchopneumonia, and no evidence of a malignant tumor. *Id.* Dr. Dennis was deposed on February 23, 2011, and described the procedure he uses to conduct an autopsy. Employer’s Exhibit 2 at 10-11, 15-17. Dr. Dennis testified that, when diagnosing pneumoconiosis, he considers the gross and microscopic examinations, and specifically looks for macules of one centimeter or greater, along with emphysema, black pigment, and silica particulate. *Id.* at 27, 29.

Dr. Caffrey prepared a consultative autopsy report based on his review of Dr. Dennis’s autopsy report and autopsy slides, as well as the miner’s employment history, death certificate, and claimant’s application for benefits. Director’s Exhibit 11. Dr. Caffrey noted diffuse acute bronchopneumonia, emphysema, silica particles, diffuse edema, multiple lesions of simple coal workers’ pneumoconiosis consisting of anthracotic pigment and reticulin, and micronodules and macronodules, ranging from 0.2 centimeter to 1.2 centimeters, with some consisting of anthracotic pigment and collagen. *Id.* Dr. Caffrey was deposed on October 25, 2011, and testified that he did not diagnose progressive massive fibrosis because he follows a pathology standard that requires the observation of a lesion of two centimeters in diameter, and that he did not observe such lesions. Employer’s Exhibit 7 at 16. According to Dr. Caffrey, progressive massive fibrosis can be suspected on gross examination, but “only absolutely confirmed microscopically.” *Id.* at 26.

In evaluating the evidence on remand, the administrative law judge addressed the conflicting opinions of Drs. Dennis and Caffrey, who are both Board-certified in anatomic and clinical pathology, incorporating by reference her descriptions of both physicians’ autopsy reports and deposition testimonies in her 2012 decision. Decision and Order on Remand at 6. In accordance with the Board’s instructions, the administrative law judge assessed the relevance of Dr. Dennis’s status as the autopsy prosector. *Id.* The administrative law judge noted that “Dr. Dennis stated that he had an advantage as the autopsy prosector because he can feel, touch and describe what he is observing, and he can then document these observations with evidence in the form of slides.” *Id.*; see Employer’s Exhibit 2 at 46. However, the administrative law judge noted that Dr. Caffrey disagreed that the autopsy prosector’s ability to conduct the gross examination provides an advantage, asserting that a review of the prosector’s gross observations and properly prepared slides puts a reviewer “on the same playing field as the pathologist who did the autopsy.” Decision and Order on Remand at 6; see Employer’s Exhibit 7 at 25-26. The administrative law judge then discussed Dr. Dennis’s testimony regarding the manner in which he diagnoses progressive massive

fibrosis and noted that he “explained that there are three different variables in determining whether progressive massive fibrosis exists: the measurement obtained by gross viewing, a measurement based on the equivalency rule, and the measurement visible on a slide.” *Id.*, see Employer’s Exhibit 2 at 45. With regard to the size of macules, the administrative law judge noted that Dr. Dennis stated that the size is measured on gross examination, but that the size that shows up on a slide may be smaller, and that he notes in his report the discrepancy between what he observes and what is measured on a slide. *Id.* As such, Dr. Dennis reiterated his advantage of being able to perform the gross examination. *Id.*

The administrative law judge accorded greater weight to Dr. Dennis’s opinion than Dr. Caffrey’s opinion because she was persuaded that Dr. Dennis’s role as autopsy prosector permitted him the benefit of performing both a gross and microscopic examination that was not available to Dr. Caffrey. Decision and Order on Remand at 8. The administrative law judge found Dr. Dennis’s opinion well-supported by his gross and microscopic examinations and that his well-reasoned “diagnosis of progressive massive fibrosis and massive lesions” are consistent with the regulatory language of 20 C.F.R. §718.304(b). *Id.* The administrative law judge found Dr. Dennis’s explanations sufficient to establish that the autopsy evidence had an equivalency on x-ray of at least one opacity that was greater than one centimeter in diameter and that Dr. Dennis’s diagnosis of progressive massive fibrosis is equivalent to a diagnosis of “massive lesions” under 20 C.F.R. §718.304(b). *Id.* She accorded less weight to Dr. Caffrey’s opinion because he relied on specific criteria to define progressive massive fibrosis that the Department of Labor has declined to adopt and because Dr. Caffrey did not explain whether the 1.2 centimeter macronodule he observed meets the equivalency criteria. *Id.* The administrative law judge concluded that, based on the greater weight given Dr. Dennis’s opinion, claimant established that the miner suffered from complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(b). *Id.*

Section 411(c)(3) of the Act, as implemented by 20 C.F.R. §718.304, provides an irrebuttable presumption of total disability due to pneumoconiosis if the miner suffers or suffered from a chronic dust disease of the lung which: (A) when diagnosed by chest x-ray, yields one or more large opacities (greater than one centimeter in diameter) classified as Category A, B, or C; (B) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (C) when diagnosed by other means, is a condition which would yield results equivalent to (A) or (B). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304(a)-(c). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held, “[b]ecause prong (A) sets out an entirely objective scientific standard’ - i.e., an opacity on an x-ray greater than one centimeter - x-ray evidence provides the benchmark for determining what under prong (B) is a ‘massive lesion’ and what under prong (C) is an equivalent diagnostic result reached by other means.” *E. Assoc. Coal*

Corp. v. Director [Scarbro], 220 F.3d 250, 256, 22 BLR 2-93, 2-101 (4th Cir. 2000), quoting *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, 22 BLR 2-554, 2-560-61 (4th Cir. 1999). In addition, the Fourth Circuit has recognized that a diagnosis of massive lesions, standing alone, can satisfy the “statutory ground” for invocation of the irrebuttable presumption. *Perry v. Mynu Coals, Inc.*, 469 F.3d 360, 365, 23 BLR 2-374, 2-384 (4th Cir. 2006).

Employer contends that the administrative law judge erred in giving Dr. Dennis’s opinion more weight on the basis that he was the autopsy prosector. We disagree. On both gross and microscopic examination, Dr. Dennis identified macules measuring between one and 1.5 centimeters. Director’s Exhibit 10. The administrative law judge stated:

As Dr. Caffrey himself concedes, the autopsy prosector has a great responsibility of making the observations on gross examination, which is of relevance because Dr. Dennis had the advantage of being able to identify and palpate macules which were one centimeter or larger on gross examination. Dr. Dennis convincingly explains why slides may not accurately reflect or corroborate a measurement that he makes on gross examination. Dr. Dennis’s ability to record measurements based on information he obtained on his gross examination provides him with an advantage which was not available to Dr. Caffrey and lends additional credence to his microscopic findings.

Decision and Order on Remand at 8. The administrative law judge provided a valid rationale for concluding that Dr. Dennis’s status as the autopsy prosector provided him with an advantage over Dr. Caffrey in determining the presence and the size of the lesions on gross examination. *Urgolites v. BethEnergy Mines*, 17 BLR 1-20, 1-23 (1992); see *Perry*, 469 F.3d at 366, 23 BLR at 2-386; *Gruller v. BethEnergy Mines, Inc.*, 16 BLR 1-3, 1-5 (1991). Additionally, because employer has not explained how the fact that Dr. Dennis performed the miner’s autopsy at a funeral home,⁵ and did not review the miner’s medical history or death certificate⁶ before providing his diagnoses, detracted from the credibility of his autopsy report, we reject those arguments. See *Shinseki v.*

⁵ Dr. Dennis testified that it does not make a difference if the autopsy is performed in a hospital setting and indicated that a funeral home “prep room” has the same equipment as a morgue. Employer’s Exhibit 2 at 41-42.

⁶ On the miner’s death certificate, Dr. Rice listed the immediate cause of death as cerebrovascular accident. Director’s Exhibit 9. Dr. Rice identified dementia and fracture of the left humerus as underlying causes of death. *Id.*

Sanders, 556 U.S. 396, 413 (2009) (appellant must explain how the “error to which [it] points could have made any difference”).

We also reject employer’s argument that Dr. Dennis’s acknowledgment that he measures lesions and macules using his finger detracts from the credibility of his opinion. Contrary to employer’s assertion, Dr. Dennis did not state that his sole measurement of macules was through the use of his finger. Rather, Dr. Dennis testified that, as part of the gross examination, he used his finger to palpate the macules he identified in order to determine their approximate size. Employer’s Exhibit 2 at 28.

Therefore, for the above-stated reasons, we hold that the administrative law judge acted within her discretion in giving greater weight to Dr. Dennis’s opinion as the autopsy prosector. *See Perry*, 469 F.3d at 366, 23 BLR at 2-386; *Urgolites* 17 BLR at 1-23 (1992); *Gruller*, 16 BLR at 1-5.

Employer further argues that the administrative law judge erred in finding that Dr. Dennis opined that the macules he identified would appear as greater than one centimeter in diameter on x-ray, as Dr. Dennis “specifically stated” at his deposition “that he was unable to make an equivalency statement.” Employer’s Brief at 11. As such, employer contends that substantial evidence does not support the administrative law judge’s determination that Dr. Dennis’s opinion satisfies the requirements of 20 C.F.R. §718.304(b). We disagree. As indicated *supra*, the Fourth Circuit held in *Blankenship* and *Scarbro* that the “massive lesions” described at 20 C.F.R. §718.304(b) are those which, when x-rayed, would show as opacities greater than one centimeter in diameter. *See Scarbro*, 220 F.3d at 256, 22 BLR at 2-101; *Blankenship*, 177 F.3d at 243, 22 BLR at 2-560-61. Subsequent to those decisions, the Fourth Circuit recognized in *Perry* that evidence of massive lesions provides an independent “statutory ground” for invocation of the irrebuttable presumption. *See Perry*, 469 F.3d at 365, 23 BLR at 2-384.

Based on his autopsy findings, Dr. Dennis diagnosed “[p]rogressive massive fibrosis with moderate to severe emphysematous change, black pigment deposition, macular development greater than 1.5 [centimeters] with two distinct foci of adjacent emphysema moderate to severe with macular development.” Director’s Exhibit 10. Although Dr. Dennis testified, “I have some trouble with making an equivalency statement,” he was not specifically describing the circumstances of this case. *Id.* at 27. Instead, Dr. Dennis was emphasizing the need for the macule to be “turned in the right plane” when it is x-rayed and he stated, without equivocation, that a macule that is 1.5 centimeters in diameter will appear on an x-ray as 1.5 centimeters in diameter if the macule “is turned in the right plane” when the x-ray is taken. *Id.* at 26-27. In considering this issue, the administrative law judge stated that:

Dr. Dennis testified that an x-ray is taken at a 90 degree angle and is limited if a macule is skewed in its orientation; a 1.5 centimeter macule which is off 15 to 45 degrees will only show as .6 or .7 [centimeters] in diameter on x-ray, [Employer's Exhibit 2 at 47], however, if an x-ray is taken in the appropriate angle, using the apical lordotic view, a radiologist will be able to measure the macule on x-ray the same as what a pathologist measures. [Employer's Exhibit 2 at 27].

Decision and Order on Remand at 8. The administrative law judge found that Dr. Dennis's "well-reasoned and supported" explanation was "sufficient to establish that the autopsy evidence had an equivalency on x-ray of at least one opacity that was 1 centimeter or greater in diameter." *Id.* Because it is supported by substantial evidence, we affirm the administrative law judge's finding that Dr. Dennis's pathological diagnosis contained an equivalency determination. Having rejected employer's allegations of error, we affirm the administrative law judge's finding that Dr. Dennis's diagnosis of progressive massive fibrosis was well-reasoned, well-documented, and supported by his gross and microscopic examinations. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336; Decision and Order on Remand at 10.

The administrative law judge, therefore, permissibly determined that Dr. Dennis's diagnosis of "progressive massive fibrosis," with macular development measuring 1.5 centimeters in diameter, was sufficient to establish "massive lesions" at 20 C.F.R. §718.304(b). Director's Exhibit 10; *see Perry*, 469 F.3d at 365 n.4, 23 BLR at 2-385 n.4; *Gray v. SLC Coal Co.*, 176 F.3d 382, 387, 21 BLR 2-615, 2-624 (6th Cir. 1999); *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 1359, 20 BLR 2-227, 2-229-30 (4th Cir. 1996). Consequently, we affirm the administrative law judge's finding that claimant established the presence of complicated pneumoconiosis at 20 C.F.R. §718.304(b), based on Dr. Dennis's diagnosis of progressive massive fibrosis.⁷ *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 207-208, 22 BLR 2-162, 2-168 (4th Cir. 2000); *Hicks*, 138 F.3d at 528, 21 BLR at 2-326. Therefore, we also affirm the administrative law judge's

⁷ Although employer makes a general statement that the administrative law judge erred in discrediting Dr. Caffrey's opinion, employer does not identify error in the reasons the administrative law judge provided for giving Dr. Caffrey's opinion less weight. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009). Moreover, we affirm, as within her discretion, the administrative law judge's discrediting of Dr. Caffrey's opinion because he relied on a definition of progressive massive fibrosis requiring that the lesions measure at least two centimeters in diameter, a standard that the Department of Labor has declined to adopt. *See* 65 Fed. Reg. 79,920, 79,936 (2000); *Harman Mining Co. v. Director, OWCP [Looney]*, 678 F.3d 305, 25 BLR 2-115 (4th Cir. 2012).

finding that claimant invoked the irrebuttable presumption that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.304.⁸

⁸ We affirm, as unchallenged, the administrative law judge's finding that the miner's complicated pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order on Remand at 9.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits on Remand is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge